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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 339

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

NEWS SYNDICATE COMPANY, INC., and NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NEW YORK MAILERS' UNION NO. 6

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 821-836) is reported at 279 F. 2d 323. The findings of fact, conclusions of law and order of the Board (R. 635-695, 703-728, 751-760) are reported at 122 NLRB 818.

JURISDICTION

The opinion of the Court of Appeals was filed on May 20, 1960 (R. 821-836), and its decree was entered on June 8, 1960 (R. 836-837). The petition for a writ of certiorari was filed on August 18, 1960, and was granted on November 7, 1960. 364 U.S. 877 (R. 837).

STATUTES INVOLVED

The relevant statutory provisions are set forth in petitioner's brief at pages 2-3.

QUESTIONS PRESENTED

The questions presented are set forth at page 4 of petitioner's brief.

COUNTERSTATEMENT OF THE CASE

The Board concedes (Br., pp. 13-14) that its findings were reversed by the Court below. *Certiorari was not sought or granted on this issue.* Yet the Board still states the facts as found by it (Br., pp. 5-13), relies on findings (Br., pp. 18, 36-38) which the Court below set aside (R. 835), and, though the Court below found the practices under the agreement to be entirely lawful (*id.*), persists in claiming that they were unlawful (Br., p. 38). The Board's excuse for smuggling in its findings is that "the court's view of the facts appears to be dependent upon" its interpretation of the Laws clause (Br. p. 8, n. 5). This is untenable on its face, refuted by the opinion below, and utterly inconsistent with the Board's subsequent contention that its view of the Laws clause is supported by the rejected findings. (Bd. br. pp. 36-39). It therefore becomes necessary to summarize the holding of the Court below, to which the findings now relied on by the Board have no recognizable similarity.

The Court held (R. 822) "The contract contains nothing which on its face could be said to be violative of the Act. The General Counsel so conceded at the hearing and the Board does not contend otherwise." The agreement defined the requirements for employment as journeyman competence and experience, not Union membership or non-membership (R. 822, fn. 5). It was so applied. As the Court found (R. 832),

> ". . . the hiring procedures are based upon nondiscriminatory contractual criteria; i.e. competency as evidenced by journeyman status, and seniority based upon length of employment as a journeyman with the hiring employer and as a journeyman elsewhere in the industry."

The Court examined with care the practices under the agreement which it described (R. 831) as follows:

> "Full-time employees, known as 'regular situation holders,' form the bulk of the mail room labor force and they are not required to 'shape' for work, i.e., to be hired on a day-to-day basis. The record indicates, without apparent exception, that such employees are all both journeymen and union members . . . If, as is quite often the case, the size of the day's newspaper requires the employment of additional mailers, the foreman next hires from men who shape the shop 'regular situation holders' and 'regular substitutes' from other newspapers, in preference to 'other extras' . . . The record indicates that many of these 'other extras' . . . are men engaged in full-time occupations outside the newspaper industry who shape either irregularly or regularly, but at infrequent intervals throughout the week . . ."

As the Court below found (R. 834, fn. 24)

> "What is even more important, no 'nonunion extras' were journeymen, and all 'outside union men' were journeymen."

The Board's decision was based on a verbal trick. The critical finding of the Trial Examiner, adopted by the Board, was that (R. 672)

> ". . . the term 'journeymen' and 'competency' are indiscriminately thrown over all union members as a shield behind which the unlawful closed shop and preferential hiring practices may be maintained and enforced."

No evidence supports this finding, which was carefully examined and rejected (R. 830-835), and that reversal is not challenged here. Yet the Board continues to rely on this discredited theory (Br., pp. 8-11, 36-39). By coupling the undisputed fact that all journeymen and regular substitutes had exercised their lawful right to become Union members, with the equally undisputed fact that "other extras" were not eligible for Union membership, the Board attempted to create the illusion that preference was accorded because of Union membership rather than because of nondiscriminatory competence and experience considerations. The Court below was not misled, and these findings are not in issue here. It held (R. 834) that there was

> "... a dearth of evidence either that a Union journeyman has ever been hired in preference (let alone, an unlawful preference) to a nonunion journeyman, or that the qualifying standards for taking a competency examination are discriminatory. The record is barren of even the slightest hint that there has been discrimination in the conduct of the examinations."

It specifically found that all practices under the agreement had been lawful (R. 835).

Throughout its Brief, the Board's findings are repeated as if they had never been the subject of judicial review. (See particularly pp. 18, 36-38). This Court has expressed its reluctance to be a finder of facts *de novo,* even when that issue is properly before it, as it is not here. *NLRB* v. *Pittsburgh S. S. Co.,* 340 U.S. 498, 502-503; *NLRB* v. *American National Insurance Co.,* 343 U.S. 395, 409-410. We shall therefore not further pursue these hares. Lest there be any lingering doubts, however, we have lodged with the Clerk of this

Court copies of our briefs[1] before the Court below which fully demonstrate the lack of any evidence—much less substantial evidence—to support the Board's findings.

SUMMARY OF ARGUMENT

We respectfully refer the Court to the brief of petitioner in *ITU et al.* v. *NLRB*, No. 340, this Term (pp. 9-12) for a summary of our principal argument in this case.

In this Court, the Board advances a novel argument, based on no findings, and which was not presented to the Court below, *i.e.*, that the General Laws clause of the agreement is illegal because of certain litigation, involving the ITU, which dealt with events occurring in late 1947 and early 1948, immediately after passage of the Taft-Hartley Act. The fact that certain issues were decided adversely to the ITU's contentions at that time is used as the basis for an argument that the ITU has sought to maintain closed shop conditions since that time.

This argument ignores all the intervening events, which demonstrated that this clause has been and can be lawfully applied. It also ignores (1) the holding of the Court below that the particular agreement, including this clause, here under scrutiny, has been lawfully applied (a finding not challenged here) and (2) the fact that in the earlier litigation the General Laws clause was not attacked. In this Court the Board asserts for the first time that foremen and employees would consider all General Laws to be applicable until an appropriate tribunal should rule otherwise. No evidence supports this assertion, and it is contrary to

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[1] Filed on behalf of Respondent New York Mailers' Union #6 and the ITU as *Amicus Curiae*.

the explicit language of the clause itself and to experience under it. The Board maintains that employees would not read the agreement as "lawyers or judges" might. This is an implied admission that "lawyers or judges" would read it to be lawful.

The priority (seniority) provisions of the agreement are lawful. The Court below correctly held, in findings unchallenged here, that these did not delegate complete control over priority to the Union, within the Board's decision in *Matter of Pacific Intermountain Express Co.*, 107 NLRB 837, *enforced as modified*, 225 F. 2d 343 (CA8). The Board's decision in that case is in any event wrong. Unions have an entirely legitimate interest in seniority problems. The presumption that they may misuse such power, on which the Board's decision expressly rests, has no rational basis. Further, the Board has made the presumption irrebuttable, contrary to the requirements of due process.

The provisions of the agreement dealing with the duties and Union membership of foremen are lawful.

The Board has expressly represented to the Court of Appeals for the District of Columbia Circuit that the doctrine of *Matter of Mountain Pacific Chapter, etc.*, 119 NLRB 883, *enforcement denied*, 270 F. 2d 425 (CA9) now before this Court in *Local 357, etc.* v. *NLRB*, No. 64, is applicable solely to exclusively union-operated hiring-halls. In this case, as the Court below found, in findings not challenged here, there was no hiring hall, exclusive or non-exclusive. Yet, despite the representations made to the District of Columbia Circuit, the Board relies on that doctrine in this case. We say that this is an effort to mislead the Courts of Appeals. The *Mountain Pacific* doctrine is in any event wrong.

The Board's Order is invalid, in that it remits to the contracting parties the task of specifying which of the General Laws are lawful, and which unlawful, and authorizes and directs employers to make this determination for the union. Its attempted application of the *Brown-Olds* remedy to the facts of this case confers a windfall on the employees in question.

ARGUMENT

1. THE BOARD HAS NOT SHOWN THE GENERAL LAWS CLAUSE TO BE INVALID.

This subject has been fully covered in Petitioners' Brief in *ITU et al. v. NLRB*, No. 340, this Term, at pp. 12-29. We respectfully request that the argument there made stand as our principal argument in this case, and confine ourselves to answering certain contentions of the Board in its brief.

It is of some interest that the Board has once more come up with a new and different list of the General Laws deemed to be unlawful,[2] this time seven, a number not previously played. (See Appendix B, Brief, No. 340.) And, not for the first time,[3] the Board seeks to use its Brief before this Court to expound a *rationale* for its decision which the Board might have used had it thought of it, but which was not presented to the Court below.

The entering wedge for this new *rationale* is a group of cases involving the ITU concerning events in late 1947 and 1948, which are cited at p. 23, fn. 15, of the Board's brief. This litigation was not mentioned by

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[2] Brief, pp. 6-7, fn. 4; Art. V, Sec. 11, Art. VII, Secs. 1, 2, Art. VIII, Sec. 1, Art. IX, Secs. 2, 5, 6.

[3] For example, in *Local 60, etc. v. NLRB*, #68, this Term, the Board abandons, at least verbally, the "encouragement is inevitably coercion" argument, which was the basis of applying its *Brown-Olds* remedy here (R. 711).

the Board in its Decision (See R. pp. 703-726). The Intermediate Report in this case set forth a "brief resume" thereof (R. 639-640), but placed no further reliance thereon. Petitioner argues (Br. pp. 16, 23) that prior to 1947 the ITU "avowedly" operated on a closed-shop basis, as indeed it did, and lawfully so. It is asserted (Br. pp. 16, 24) that prior to 1947 the closed shop was "imposed mainly by the insertion of the ITU General Laws into collective bargaining contracts." Since this issue has not heretofore been litigated, it is not surprising that no evidence to support this assertion can be, or is, cited. The statement is inaccurate. Prior to 1947 the closed shop in the printing trades was imposed by contractual requirements, which had no reference to the General Laws, by which employers agreed to employ and retain only Union members as employees. Closed shop conditions would have obtained had there been no General Laws whatever.

These assertions provide a backdrop for the Board's contention that since passage of the Act, the ITU sought, "by numerous devices, to maintain closed shop conditions." (Br. p. 33). This is buttressed by a reference to "Conditions of Employment," which were used for a few weeks in 1947 and abandoned before there was any finding that they were unlawful, (see *Matter of ITU*, 86 NLRB 951, 981) and to an agreement tendered at that time, known as P-6A (Br., p. 30), used for a brief period in 1948. As to that agreement, a Trial Examiner, in findings not thereafter challenged, found (86 NLRB at page 1011) that

> "It is contended that certain specific clauses of P-6A, considered separately and in certain combinations, constitute that form a legally binding agreement to maintain a closed shop. I do not agree. It is clear from the record as a whole that P-6A was not designed as a legally enforceable

closed shop contract, was not represented as such, and was not so understood."

It is true that the Examiner found, and that the Board and the Court of Appeals for the Seventh Circuit sustained the finding, that a demand for a clause permitting cancellation of such an agreement on sixty days' notice violated the Act. Yet it will hardly be contended that reasonable lawyers might not have considered such a clause lawful. This is perhaps even truer of the holding, in *Evans* v. *ITU*, 81 F. Supp. 675 (N. D. Ind.) cited at page 31 of the Board's brief, that the *failure* to propose a neutral tie-breaker on a joint employer-union apprentice committee, violated the Act.

For immediate purposes, however, the most significant aspect of that litigation was that the *General Laws clause was not challenged*.[4] Despite the numerous attacks on the agreements then in question, the great bulk of which were rejected, it is apparent that this clause was considered so clearly legal that it was not made a target.

We earnestly submit that nothing could be more revealing of the barrenness of the Board's case than this raking about in the embers of dead litigation dealing with events of over thirteen years ago, following passage of a new, complex, and widely unsettling statute. Essentially Petitioner's position is that, because the Board and the Courts disagreed with certain legal arguments then advanced by the ITU, everything the ITU has done since must be unlawful. We agree that the statute has been so administered by the Board in this case, No. 340, and in the cases compiled in Appendix B of Pet. Br. No. 340. Implicit in Petitioner's

[4] See *Matter of ITU*, 86 NLRB 1014-1020; *Evans* v. *ITU*, 81 F. Supp. 675, 680, 683, 685-88.

argument, not relied on by the Board and not presented to the Court below, is the assumption that employees and foremen would seek the solace of a law library to read through these antique cases, and would be guided by what they there found, rather than by the terms of the agreement under which they are employed.

The Board repeatedly asserts that foremen and employees would consider all General Laws to be effective, "at least until an appropriate tribunal should rule otherwise" (Br., pp. 18, 19, 34, 38, 42). This, too, is novel. No evidence is or can be cited in support. If such had been the result the parties intended, they could have written the clause to provide that "All General Laws shall be effective until an appropriate tribunal shall rule otherwise." They did not do so. To the contrary, they said quite explicitly that no General Law is to apply if enforcement would result in a violation of Federal Law. The Board can cite no case in which a General Law was illegally applied; indeed, as the Court below found, under a substantially identical agreement (R. 834, n. 25),[5] there was no discrimination in hire and not even a complaint filed which would raise an issue warranting arbitration of any problem. These realities dispel the Board's fictional surmisings.

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[5] "The only offered evidence as to the fate which would await a nonunion man claiming competency who made application for employment as a journeyman, was Union testimony, here unchallenged, concerning past practices under a substantially identical contract between the Printers' Union, New York Typographical Union, No. 6, and the Publishers Association of New York City. Over fifty nonunion journeymen, claiming competency, were allegedly given the identical competency examination as that given apprentices, and while only twenty-six passed, none of those who failed complained of discrimination. Interestingly enough, all of the successful twenty-six applicants went to work prior to their admission into the Union, and while the Union application of one was rejected he remains at work in the trade. See also *Evans* v. *International Typographical Union*, *supra*, at 686-687."

The real thrust of the Board's argument, here and elsewhere, is that "... employees in an industrial plant cannot be expected and would not play the role of lawyer or judge ..." (Br. pp. 19, 35, 43). We believe employees will not resent this. Printers are quite as willing to leave to lawyers and judges questions of legality, as lawyers and judges are to leave to them the setting of type. They recognize their lack of specialized competence to decide these matters. The fact, with which we wholeheartedly agree, (Br. p. 34) that "it would be unlikely that an employee or foreman would go over the voluminous ITU laws, provision by provision, and attempt to determine what provisions were likely to be illegal and thus no longer operative," is an entirely deserved tribute to the levelheaded common sense of American workers. But it does not establish an unfair labor practice.

We submit that it would require no great forensic ability to convince foremen and employees that this clause does not contemplate discrimination in hire; there are certainly few, in this industry at least, who are not by now aware that the Taft-Hartley Act illegalized the closed shop. But we can make no such presentation to a hypothetical group, concealed from public view by the fog of suspicion and illiteracy which the Board has raised. The fact that the Board has been unable to demonstrate that any General Law has been illegally applied is good evidence that the ITU, and its attorneys, know how to "separate the wheat from the tares" (*Alpert* v. *ITU*, 161 F. Supp. 427, 431; Br., p. 43) *in practice*; we confess our inability to provide answers to all the suppositious cases which can be raised in a manner satisfactory to the Board.

There is criticism of the fact that the "ITU has never furnished its locals or members a specific list of which of the General Laws were in conflict with the Act and thus suspended" (Br., pp. 12, 17, 29, 34, 42). As we have repeatedly explained, none of them is in conflict with the Act, for all of them have a valid field of application in enterprises not affecting commerce and in Canada. Appendix B to Petitioners' Brief in No. 340 makes entirely clear the fate which would await any effort to do so. We readily concede that we have not kept members of the ITU informed (except as specific, practical questions arose) concerning the numerous changes in the Board's jurisdictional standards, its voluminous and in our view frequently distorted readings of the statute, or the status of Court decisions under the Act. The ITU is a trade union, not a labor law service. However, the ITU has continually and specifically made clear to its members that they may not make union membership a qualification for hire.[6]

Petitioner cites *Radio Officers* v. *NLRB*, 347 U.S. 17 (Br., p. 38) for the proposition that "the legal effect of the General Laws clause is thus the same as though the ITU and the publishers had specifically set out closed shop provisions in the contract" (*id.*,

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[6] In addition to the change in the Laws clause to add the provision "not in conflict with law" (R. 246) and the addition of Article XIV to the General Laws (R. 246-7), the ITU eliminated the provision in the oath of membership requiring members to give preference in employment to other members. (R. 234-36). Since the Board seeks to require unions to disclaim discrimination (*e.g.*, its order here and in *Local 357* v. *NLRB*, No. 64, this Term) its minimizing of these actions (Br. p. 32) is puzzling. Again, the ITU has repeatedly instructed its locals in particular situations whether a particular contract provision or practice would violate the Act, and has repeatedly and expressly said that discrimination on the basis of union membership is forbidden. (R. 250-51; R. No. 340, pp. 99, 389-94).

p. 39). But an agreement either provides that Union membership is a condition of hire, or it does not. The phrase "the legal effect . . . is thus the same" is merely one way of saying that language means something other than what it says, and we suggest that neither *Radio Officers* nor any other decision of this Court can support this result. The ITU has sought to sustain the validity of the agreements here in question because it believes them to be beneficial to it, to its members, and to the industry. It would be fatuous to assert that a purpose has not been to encourage membership in the ITU; union leaders would be derelict in their trust if they did not follow policies designed to encourage membership. *Radio Officers* makes it clear that this is not an objective proscribed by the statute (see 347 U.S. 17 at pages 42-43). Section 8(a)(3) still contains the words *"by discrimination."*

Its factual premises thus supply no support to the Board's decision. This contract does not require membership in the union and therefore is not a closed-shop contract.[7] The Board's effort to establish the contrary

[7] We suggest that its statement of the applicable legal principles is equally dubious. Its thesis (Br., p. 20) is that the mere execution of a closed shop agreement, without more, constitutes "discrimination" within the meaning of Section 8(a)(3). While there is language in some of the cases cited at p. 20, n. 71 of the Board's brief which supports this assertion, it has not been passed on by this Court. Section 8(a)(3) requires discrimination in any "term or condition of employment." The mere execution of an agreement, until some action is taken pursuant to it, does not "discriminate" in any term or condition of employment. The Board asserts (Br., p. 20) that such an agreement is bad because "It classifies employees into two groups—those who are union members and those who are not— . . .". But mere classification is not "discrimination" in an invidious sense. See *e.g. Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 121. Such an agreement is no more than a declaration of a present intention of the parties to discriminate at some time in the future, if the occasion arises.

(pp. 21-22) must, in view of its admission that there is nothing unlawful on the face of the contract, rest on the assertion that "whether a contract requires union membership as a condition of employment is not always apparent from the face of the contract" (Bd. Br. p. 21). *American Newspaper Publishers Association* v. *NLRB*, 193 F. 2d 782 (CA 7), cited as authority, certainly stands for no such perverse principle of contract interpretation, as is plain even from the Board's statement of the case. How does one ascertain the meaning of a contract except from what appears on its face? "There is no reason apparent why terms should be implied from some outside authority to take the place of legal terms collectively bargained" *NLRB* v. *Rockaway News Co.*, 345 U.S. 71, 78-79. This is again the Board's technique here. We once more advert to the necessity of some finding of "motive" to sustain a finding of discrimination. As Judge Learned Hand pointed out in *NLRB* v. *Business Machines and Office Appliance Conference Board*, (CA 2) 228 F. 2d 553, at 561 (concurring opinion)

> "As I understand it, the Court in that case [*Radio Officers*] did not say that the employer's motive was not crucial in deciding whether he had 'discouraged' joining the union; but it did say that a special finding as to his motive was not essential."

See also *Pittsburgh-Des Moines Steel Co.* v. *NLRB*, 284 F. 2d 74 (CA9). No such finding of motive was

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It may never arise, or the parties may change their minds. The Board thus seeks to inflate what is no more than one item of relevant evidence in determining whether there has been "discrimination," into a finding of a statutory violation. And we believe that this Court's opinion in *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 281, forecloses any contention that such contractual language, without more, can be said to "restrain or coerce" within the meaning of Section 8(b)(1)(A). (See Brief for Petitioners, No. 340, p. 20, fn. 11).

here made, nor would there be any evidence to support one.

Petitioner complains that the incorporation of the General Laws not in conflict with law "tends to infringe the Section 7 rights of employees in those plants where the closed shop is illegal." (Br. p. 43). These Section 7 rights are not defined in its brief,[8] but if we understand the Board's position, it contends that employees are to be free of any encouragement to join or remain in a union which may result from their erroneous interpretation of a contract which is admittedly lawful on its face. (See Br. pp. 34-35). We submit that there is no Section 7 right to be free of subjective apprehension;[9] recognition of such a right would empower the Board to "sit in judgment upon"[10] every provision in any collective bargaining agreement, to determine (with no objective standards to guide or restrain it) what meaning the "contracting parties could reasonably expect that the employees would attribute" thereto (Br. p. 33-34). The attack on the ITU General Laws, (and on the exclusive hiring hall in #64, which is premised on the same fallacy) provides ample warning of the hazards to collective bargaining if the Board is allowed to expand Section

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[8] Although Br., p. 43 says that it has been "shown" that the use of the General Laws clause "tends to infringe Section 7 rights", no other reference to that Section is made in its Argument. (See Br., p. iv.)

[9] Query: How will the Board protect an employee, for example, in a Southern textile mill, where there is no collective bargaining agreement, and none of the other employees are members of a union, from the fear that he will be discriminated against if he exercises his right to join?

[10] Compare *NLRB* v. *Insurance Agents Union*, 361 U.S. 477, 497.

7 in this manner, and confirms the wisdom of Chief Judge Prettyman's holding that "assumptions that employees will not understand a lawful contract cannot be the basis for holding the contract illegal". *Honolulu Star-Bulletin, Ltd.* v. *NLRB*, 274 F. 2d 567, 570. Moreover, the Board entirely discounts the Section 7 right of all the employees to bargain through their representative, the union, about the subjects of the General Laws, such as seniority, apprenticeship, hire and discharge. That right, by contrast, is firmly established. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236.

For these reasons, we submit that the Board has not shown the General Laws clause to be unlawful.

2. THE PRIORITY (SENIORITY) AND FOREMAN PROVISIONS OF THE AGREEMENT ARE LAWFUL.

While the Board asserts that the legality of the General Laws clause is the sole issue presently before the Court, we disagree with the statement (Br. p. 4, fn. 1) that

> "The conclusion of the court below that the contract was not vulnerable on these grounds [the footnoted issues] was so entwined with its holding on the principal question that a reversal of that holding would make appropriate remand to that court for reconsideration of the subsidiary questions."

The Court below carefully analyzed these contract provisions and the practices under them without reference to its holding with respect to the General Laws clause, and the Board is not on this ground entitled to a second bite at the apple before that Court. We therefore turn to the issues footnoted by the Board at page 4 of its Brief, and Page 2, n. 2, of its Petition for Certiorari.

(a) The priority (seniority) provisions of the agreement are lawful.

The Board found that the agreement here in question unlawfully delegated control of priority matters to the Union (R. 646-647, 660-62, 664, 705). The Court below held that "there is a fatal defect in the Board's minor premise; viz., that unrestricted hiring and seniority control was, under the contract, delegated to the union" (R. 829). That holding is not challenged here. We turn, therefore, to the Board's major premise, that it is unlawful for an employer to delegate to a union control over seniority matters. The authority for this thesis is *Matter of Pacific Intermountain Express Co.*, 107 NLRB 837, *enforced as modified, NLRB* v. *International Brotherhood, etc.*, 225 F. 2d 343 (CA 8), in which the Board overruled its prior holding in *Matter of Firestone Tire and Rubber Co.*, 93 NLRB 981. The *rationale* for the Board's reversal was there stated:

> "The objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and that information is, as a rule, peculiarly within the knowledge of the employer. Indeed, the area in which the union is likely to be more informed than the employer with respect to the employer's employees is that pertaining to employees' union membership or to the employees' compliance with the union's constitution, bylaws, or other regulations—subjects, however, which obviously are not relevant considerations in the implementation of a seniority provision. *We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a*

> *nondiscriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union.* Accordingly, the inclusion of a bare provision, like that in the 1949 contract, that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not by itself enough to cure the vice of giving to the union complete control over the settlement of a controversy with respect to seniority." 107 NLRB 845-46 (emphasis supplied).

The factual premises on which this holding rests are plainly lacking here, as this record shows, and as the court below found (R. 826-828, 831). In this industry information concerning seniority is not "peculiarly within the knowledge of the employer". Employees seeking work, who meet the contractual requirements for employment, place their names on a priority list, or slipboard, which is available to all employees. "Priority works in a public fashion" (R. 254, and see 252-257), and hiring is done in strict priority order, from this list. Any unfairness is immediately apparent.

Further, this Court has held that the Act does not require that seniority be based solely on the relative employment history of those covered by an agreement: ***Ford Motor Co.*** **v.** ***Huffman,*** 345 U.S. 330, 338-339, 342; ***Aeronautical Lodge*** **v.** ***Campbell,*** 337 U.S. 521, 526-529. The standards for seniority determinations are peculi-

arly appropriate for collective bargaining between the parties, without the Board's paternal supervision. Dunlop and Healy, *Collective Bargaining*, pp. 229-231 (1953); Slichter, Healy and Livernash, *The Impact of Collective Bargaining*, pp. 115-135 (1960). As noted in the latter treatise (at page 116),

> "Up to this point the word seniority has been defined arbitrarily as an employee's length of continuous service with the company. This broad definition is reasonably accurate insofar as eligibility for benefit programs is concerned. It serves well in the application of benefit seniority. However, the definition may be entirely inadequate and misleading for those items involving the use of competitive status seniority to determine the order of lay-off, recall, promotion, and other preferential treatment. For these areas the definitions are almost too varied to enumerate".[11]

In general, seniority problems, as between employees of comparable competence and experience, are of little interest to management, but may be of vital interest to unions. Both therefore have a strong interest in permitting resolution of these matters by the Union.[12]

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[11] The same treatise notes at page 135: "It is generally agreed that the company should provide the union with a current seniority roster on a periodic basis. In addition, many unions have secured the weekly transmittal of all 'personnel transactions.' With these two lists in hand the union is able to check promotions, layoffs, recalls, transfers, and other transactions that might involve seniority rights."

[12] "With the development of a seniority clause, there come interpersonal and intergroup differences *within the union* and problems of individual and group inequities to be solved *by the union*. • • • In some unions seniority problems are dealt with by a special internal grievance committee that is empowered to act in all cases of dispute that do not directly involve management. The responsibility is still the union's; the union is still the final arbiter of the

The Board says this is unlawful because "it is to be presumed . . . that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union . . ." But, the "law will never presume that parties intend to violate its precepts" *Owings* v. *Hull*, 9 Pet. 607, 628. "A discriminatory purpose is not to be presumed" *Snowden* v. *Hughes*, 321 U.S. 1, 8; *Cincinnati N. O. & T. P. R. Co.* v. *Rankin*, 241 U.S. 319, 327; *Korbly* v. *Springfield Institution for Savings*, 245 U.S. 330, 336; *Bank of Kentucky* v. *Adams Express Co.*, 93 U.S. 174, 181; *Thornton* v. *Bank of Washington*, 3 Pet. 36, 42. Further, as is now its wont, the Board once more deletes the phrase "by discrimination" and finds a violation of the statute merely in a presumed *encouragement* of membership.

The Court below made explicit findings, not here attacked, that the priority provisions had operated in nondiscriminatory fashion. (R. 826-828) It is thus

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meaning of seniority.'" Sayles, *Seniority: An Internal Union Problem*, 30 Harv. Bus. Rev. 55, 56, 61 (1952) (emphasis in original).

"To a union struggling for complete recognition, control over lay-off policies is important both as an organizing issue and as a protection from discrimination against union members. In the determination of merit or competency, management has wide discretion over which a union can exert very little control. It is natural, therefore, that organized labor should attempt to limit management's control by forcing adherence to a clearcut and definite formula based on length of service." Harbison, *The Seniority Problem in Mass Production Industries, XXX Proceedings, American Economic Association*, pp. 223-225 (March, 1940).

". . . the equal division of work and the seniority rule are by far the most important methods employed by unions to control layoffs . . ." *Slichter, Union Policies and Industrial Management*, p. 137 (1941).

clear that the *Pacific Intermountain* presumption is conceived by the Board to be irrebuttable (See also 107 NLRB 845 at 846). But an irrebuttable presumption which has no rational basis and rests, like this, on mere suspicion, is invalid as a denial of due process. *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 86; *Manley* v. *Georgia*, 279 U.S. 1; *Tot* v. *United States*, 319 U.S. 463. *Cf. Speiser* v. *Randall*, 357 U.S. 513, 523-24. The Board appraises this contract on the basis of "what other people intended by other contracts of a similar character," contrary to *Rountree* v. *Smith*, 108 U.S. 269, 276.

(b) The provisions of the agreement dealing with the duties and Union membership of foremen are lawful.

This issue has been fully briefed in *ITU* v. *NLRB*, No. 340, this Term, and we respectfully request that the argument there made (at pp. 34-37) be treated as our argument in this case. In our view, Judge Hincks' opinion conclusively disposes of this issue (R. 828-829).[13]

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[13] That the Court more accurately reflects industrial reality than the Board's opinion is shown by the following comments:

In Leiter, *The Foreman in Industrial Relations*, 57-60 (1948) it is pointed out in discussing foremen in the printing trades,

> "The unions invariably recognize that foremen are representatives of management. They are employed to direct the operations and supervise the men. The employer is in no way restricted in the hiring or firing of his foremen. The union has never considered the dismissal of a foreman as subject to the grievance procedure. This means that the foreman cannot depend on seniority and upon union protection for tenure of employment. He must continue to perform his duties in a manner satisfactory to the employer in order to keep his job; for the employer otherwise can replace him by another union member. Generally, the foreman is not answerable to the union for the carrying out of

(c) The Board's Mountain Pacific [14] doctrine has no application to this case, and is in any event erroneous.

We believe that the Board's treatment of this issue can properly be characterized as a deliberate and wilful effort to mislead the Court of Appeals, warranting

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any of his functions, but if the union objects to any of his actions, the matter is taken *up by the regular grievance machinery* . . . The foreman stands between the union and management. He is bound to the union in that he must retain his union card to assure himself of a job in the event he is demoted. For many foremen are demoted. Demotions are fewer in the large newspaper establishments where foremen are selected from among the assistant foremen and their qualities and aptitudes are known to higher management, than in other branches of the industry. During the war, turnover among foremen increased. . . . Only a handful of foremen think in terms of insurance benefits. They know the viewpoints of both employers and employees, and can interpret the position of one to the other. Although the union has control over the foreman, and requires him to retain his membership, yet it does almost nothing for him while he is a foreman. Though occasionally some locals set a foreman scale in the contract, most of the locals fix only a minimum wage for him, which is slightly above that of journeymen. The foreman, however, bargains individually with the employer for his wages. The foreman also takes part in the first step of the grievance machinery as the representative of the employer.'

And, in *How Collective Bargaining Works*, Twentieth Century Fund, (1942) at page 147, it is noted that it is,

"clearly recognized that (in the printing trades) the foreman's first responsibility is to management. His duty to the union is to administer the agreement fairly in the plant. There are advantages in this system in that the foreman, necessarily a skilled man, is thoroughly acquainted with the union agreement and rules. He is in a good position, therefore, to interpret the union's position to management and vice versa."

[14] *Matter of Mountain-Pacific Chapter, etc.*, 119 NLRB 883 (1957), *enforcement denied, NLRB* v. *Associated General Contractors*, 270 F. 2d 425 (CA 9).

careful analysis by this Court in the exercise of its supervisory functions.

Prior to the filing of the briefs in the Court below, the Board filed with the Court of Appeals for the District of Columbia its brief in *Local 357, etc.* v. *NLRB*, 275 F. 2d 646 (CADC #14,794) now before this Court as Nos. 64 and 85. In that brief the Board set forth at length (at pp. 21-23) the physical and other characteristics of hiring halls as used in the maritime, building construction, trucking and other industries. It represented, without qualification, that

> "The Board's findings and supporting rationale [in *Mountain Pacific*] are limited to *exclusive* hiring hall agreements. They do not extend to *non-exclusive* hiring hall agreements (p. 11) . . . The Board's findings and the supporting rationale are limited to an exclusive hiring agreement. —Under a non-exclusive provision, the employer is free to hire without referral from the Union (p. 13) . . . This case, however, presents that very question, namely, whether and under what circumstances the parties may validly include in a contract the union's policy requiring all applicants for employment to be cleared through the union hiring hall (p. 18) . . . We repeat, therefore, that the Board's findings and supporting rationale are limited to exclusive hiring hall agreements (pp. 41-42) . . . Because the distinction between an exclusive hiring hall contract and a non-exclusive hiring hall contract is crucial (p. 42) . . ." (emphasis in original).[15]

[15] At p. 21 of the same brief it was said: "Essential to an understanding of the inference of inherent encouragement which is at the root of the Board's *Mountain Pacific* decision is an understanding of the character and history of exclusive hiring halls." It was stressed that "In most cases, the hiring hall is where the union holds its meeting and has its offices." (*id.*, p. 22). That

In this case, *there was no hiring hall, exclusive or non-exclusive.* As Judge Hincks noted, in findings not challenged here, (R. 830)

> "... the News, not unlike numerous other employers, merely placed its hiring powers in the hands of its principal employee, the foreman, *who discharged that responsibility on the employer's premises.*" (emphasis supplied)

Yet, having made these explicit representations concerning the limited reach of *Mountain Pacific* before the Court of Appeals for the District of Columbia, the Board relied on *Mountain Pacific* in reaching its decision here (R. 709), urged it before the Court below (R. 824, 829), and even here insists that the matter is still open in the event a remand is ordered (Br. p. 4). Even when every reasonable allowance is made for the possible failure of communication within an agency and for the zeal of counsel in presenting a case, the contrast between the representations made in *Local 357* and in this case is so glaring that we think it can only be described as an effort to mislead the Courts of Appeals. The alternative is to assume that the Board does not know the difference between a foreman and a hiring hall.

The Board's annual report for the fiscal year in which *Mountain Pacific* was decided discusses that case under the heading "exclusive hiring-hall agree-

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argument was jettisoned in the Board's brief in this Court, perhaps because the Local 357 hiring hall in that case was three miles from the union hall. In this case, as the Court below found (R. 830), the foreman hired "on the Employer's premises." Again, at p. 22 of that brief the Board said, "In most cases he [the dispatcher] and other hiring hall personnel are selected, paid and controlled by the union." Here, as the Court below found, the foreman is selected, paid and controlled by the employer. (R. 828-29; see G.C. Ex. §§ 4, 20, R. 528, 532-34).

ments," and analyzes the case in those terms. *Twenty-third Ann. Bd. R.*, pp. 85-86 (1958).[16] Congress has so understood the doctrine. See Board brief in *Local 357*, p. 44, n. 23. In these circumstances, the Board's paean to its own administrative expertise (Bd. Br., No. 64, pp. 25-34) has a hollow ring. "The administrative process will best be vindicated by clarity in its exercise" *Phelps Dodge* v. *NLRB*, 313 U.S. 177, 197.[17]

There is no need here to reargue *Local 357*. Yet it is apparent from this case that if this Court sustains the Board in its *Mountain Pacific* decision, the Board is prepared to go the whole way of declaring illegal any Union participation in the hiring process, no matter

[16] See also Petition for cert. in *NLRB* v. *Hod Carriers, etc.* (No. 75, this Term), p. 13; Brief for Respondent in *Local 60, Carpenters* v. *NLRB* (No. 68, this Term) p. 26, n. 19, 20; p. 28, n. 24.

[17] The cases cited by the Board do not support its assertion of power to create a general "rule of law the applicability of which to a given hiring agreement is not affected by extrinsic evidence." Pet. for cert. in *NLRB* v. *E & B Brewing Company*, #211, this Term, p. 12, characterizing the *Mountain Pacific* doctrine. The promulgation of rules of universal application hardly comports with "the work of applying the Act's general prohibitory language in the light of the infinite combination of events . . ." *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (Bd. Br. No. 64, p. 26). *Republic* was the first of several cases here involving no-solicitation rules; these show that this Court has eschewed "mechanical answers." *NLRB* v. *Steelworkers*, 357 U.S. 357, 364. Although "the Board's special understanding of these industrial situations" *Id.* at 363, was recognized, it was required to "appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases." *Id.* at 362-63. And where the Board failed to take into consideration a relevant factor it was reversed. *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105; *NLRB* v. *Avondale Mills*, 357 U.S. 357.

Clearly, "recognition of the appropriate sphere of administrative power here cannot exclude all judicial review of the Board's actions." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499.

to what degree, or by what methods, and irrespective of any safeguards that may be provided. The effort is to squeeze unions out of the area of control over hire—the "dam to self-organization at the source of supply" *Phelps Dodge Corporation* v. *NLRB*, 313 U.S. 177, 185, and see the history of this problem at pp. 182-187. The Board is again indulging its propensity to "sit in judgment upon the substantive terms of collective bargaining agreements". *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404. The Board's specific object is to read into the statute its preconceptions of the proper distribution of authority between management and unions. This is clear from its use of the "delegation" concept in *Pacific Intermountain Express* and its rhetoric in *Mountain Pacific*, for example: "complete and outright surrender of the normal management hiring prerogative to a union" 119 NLRB at 894; "The employers here have surrendered all hiring authority to the union". *id.* at 896. But "the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409. Indeed, if the lesson of that case had taken hold, the question of the legality of the ITU Laws clause would never have arisen, for that clause is simply a form of the management functions clause which was upheld there. The management functions clause leaves to the employer the unilateral decision of all questions not decided by the contract. The Laws clause states that all questions not decided under the contract will be disposed of according to the union Laws, but only those Laws which may be lawfully applied in the particular circumstances.

The Board attempts to justify its *Mountain Pacific* doctrine by a reliance on "experience with hiring halls

as they have traditionally operated" (Brief, No. 64, p. 37). The accuracy of this may be doubted. No such experience was cited in its opinion. The first such effort appeared in its brief in the Court of Appeals for the District of Columbia in *Local 357* v. *NLRB*, where a list of such cases was set forth as Appendix A. That list differs substantially from that appended to the Board's brief in this Court (Brief, No. 64, pp. 63-66). The technique assumes that a mailer in a New York newsroom is familiar with the "nuances" of the working rules of Carpenters' Local No. 1028 in Ardmore, Oklahoma, *Matter of Carpenters Local 1028*, 111 NLRB 1025, *enforced*, 232 F. 2d 454 (CA 10), which appears as Case No. 43, Board Brief, No. 64, p. 46, and that he will be "restrained and coerced" by the operations of a Boilermaker hiring hall in San Francisco, *Matter of Boilermakers Local No. 6*, 94 NLRB 1590, which is Case No. 3 on the same list (Bd. Br. #64, p. 43). The Board has recently been admonished[18] that "Freudian theory is not yet an adequate substitute for the required evidence of intent"; the Board's postulate here is akin to the Jungian theory of the "collective unconscious".

3. THE BOARD'S ORDER IS INVALID.

Sections II(a)(3) and II(a)(4) of the Board's Order would broadly enjoin *all* types of violations of Sections 8(b)(1)(A) and 8(b)(2) of the Act, with reference to *all* newspaper publishers in New York City (R. 716-717). Section II(a)(1) would invalidate the Union's agreements with all these publishers (*id.*). Sections II(a)(2), II(b)(1) and II(b)(2) would require the union to *specify* which of its General Laws are lawful and which are unlawful (*id.*).

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[18] *Pittsburgh-Des Moines Steel Co.* v. *NLRB*, 284 F. 2d 74, 87 (CA 9).

Since the findings of the Court below are not here attacked, the Board therefore proposes such an Order on the basis of the denial to one casual extra of one night's work (R. 835). The priority system operates only among regular employees and does not affect such casual employees (R. 831); the Board nonetheless would hold it unlawful. Discrimination was charged at two newspapers, and sustained as to one; the Board would extend its Order to all publishers. The Board does not show, and there is not, any nexus between the unfair labor practice sustained by the Court and the agreement in question. It has not shown that these agreements "were a consequence of the unfair labor practice found . . . or that they themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease and desist the specified practices any more effective." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435; *Communications Workers* v. *NLRB*, 362 U.S. 479.

With reference to the "specificity" issue, we are told that this is a matter for the "ingenuity of counsel" (R. 681). Despite the request of the General Counsel (R. 701) and the respondents that the Board make this specification, it did not do so, and the statement in the Board's Brief (p. 12) that

> "The Board's Order requires the News to specify in its current contract with the union that the provisions of the ITU General Laws *found illegal by the Board* are not incorporated in the contract" (emphasis supplied)

is untrue, for the Board made no such findings. Nor was there any testimony that this task is "difficult" (Br. p. 42); it was that it is impossible (R. 251). The reluctance of the Board to concede, even *sub silentio*,

that some of the General Laws may be valid is no adequate excuse for thrusting this task on the "ingenuity of counsel". *Swift & Co.* v. *United States,* 196 U.S. 375, 396; *Connally* v. *General Construction Co.,* 269 U.S. 385, 393; *J. I. Case Co.* v. *NLRB,* 321 U.S. 332, 341; *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 409. *Cf. Scull* v. *Virginia,* 359 U.S. 344. Specificity of court orders is "basic to correct judicial administration". *English* v. *Cunningham,* 269 F. 2d 517 (CADC). The proposed order is, indeed, a form of entrapment, for our previous experience with this issue is sufficient to apprise us that, no matter how the task is done, the Board will be waiting to pounce on the result. The Board's Order thus would place the ITU's "business under the jeopardy of contempt for violating a general injunction." *New York, N. H. & H. R. R. Co.,* v. *ICC,* 200 U.S. 361, 404, approved in *NLRB* v. *Express Publishing Co.,* 312 U.S. at 435. It is the Board's, not the respondents', duty to "separate the licit from the illicit" (Br. p. 44).

It will be noted that the Board orders the respondent News to specify which of the General Laws are lawful and which unlawful. This is unconscionable. As we have shown, (Brief #340, pp. 12-13) the General Laws represent the fruits of a century of struggle for better working conditions. The Board now proposes that employers are to be given a license, under the compulsions of a decree, unilaterally to set aside such of them as they wish. If the legality of a General Law is challenged, the ITU has the right to be apprised of that fact, to justify it, and to judicial review of an adverse finding. The Act has not granted the Board a power of attorney to execute an assignment of the legal rights of the ITU to employers. *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236, 238.

The brief of respondent News Syndicate expresses the understandable indignation of an employer at the Board's attempted application of the dues reimbursement remedy to the agreement here in question. On behalf of the union we too object, although it is our members who will obtain the windfall. There is, in this record, not a scintilla of evidence to show "restraint or coercion," either by the employer or the Union in the application of their agreement, and only by the wildest stretching can the Board assert that employees are restrained and coerced to pay dues by an agreement admittedly lawful on its face, which contains no provision dealing with the payment of dues, and which has been administered on a non-discriminatory basis.

A number of problems would be solved if employers, through court decrees, could be compelled to pay the dues and assessments of ITU members. It would eliminate a recurring source of controversy within the Union as to what their level should be, and the ITU could measurably broaden the scope of its activities if employers, rather than members, were required to bear the cost. The Board's order has the additional advantage that the ITU could unilaterally determine the amount of the employer's contribution. But, despite its obvious attractions, and contrary to the immediate financial interest of certain of our members, we feel compelled to reject this proposed fringe benefit as utterly degrading. It rests on the false—even insulting—premise that trade union members are not free citizens, voluntarily exercising their right to associate for lawful purposes, and willing to bear the necessary costs, but craven serfs meekly paying dues only under an asserted "restraint and coercion" by employers and union officials. The ITU was not founded on, and has

not survived over a century on, any such deformed judgment.

In short, the imposition of the remedy is of a piece with the Board's position on the merits: It makes of collective bargaining an ultra-hazardous activity, with absolute and heavy liability imposed on employers and unions if, in drafting their agreements, they fail to divine precisely the Board's intuition of their "foreseeable impact on employees."

CONCLUSION

For the reasons herein set forth, we urge that the judgment of the Court of Appeals for the Second Circuit be affirmed.

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February, 1961

SUPREME COURT OF THE UNITED STATES

No. 339.—October Term, 1960.

National Labor Relations Board, Petitioner, v. News Syndicate Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent union, affiliated with the International Typographical Union, entered into collective bargaining agreements with various publishers including respondent News Syndicate (and Dow Jones & Co.) which contained a provision that "the General Laws of the International Typographical Union . . . not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein." The contract limited mail-room employment to "journeymen and apprentices." The contract also provided that mail-room superintendents, foremen, and assistant foremen must be members of the union and that the foremen would do the hiring. The General Laws of ITU provided that "foremen or journeymen" should be "active members" of the union, that only union members should operate, maintain, and service any mailing machinery or equipment, that no person should be eligible as a "learner" who is not a union member.

Another provision of the contract stated, however, that "The union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement." It also provided that

the foremen "shall be appointed and may be removed by the Publishers."

The foreman at one plant was a union member and the Board found that he discriminated in favor of union men against a nonunion employee named Julius Arrigale. It also found that the foreman at another plant was a union member and discriminated in favor of union men and against a nonunion employee named Burton Randall. It concluded that the union and the News Syndicate had violated § 8 (b)(1)(A) and (2) and § 8 (a)(1) and (3) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, as amended, 29 U. S. C. § 158, respectively by their contract arrangements and by operating an unlawful closed shop and preferential hiring system.[1] It held that vesting control over

[1] Section 8 provides in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the

employment in union foremen was a delegation of exclusive control over hiring to the union without the requisite safeguards prescribed by the Board in *Mountain Pacific Chapter*, 119 N. L. R. B. 883. The order of the Board contained various provisions including a direction that all employees in the mail-rooms be reimbursed for dues and assessments paid the union for a period beginning six months before the service of the charges against it; and this duty was made, so far as concerns the news mail-room, a joint and several liability of the union and News Syndicate. 122 N. L. R. B. 818.

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periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

The Board petitioned the Court of Appeals for enforcement of the order. That court held that the finding of discrimination against Randall was in part supported by the record; and it refused enforcement of the Board's order, allowing the Board if it wished, to enter an order directed only to that instance of discrimination the Court of Appeals found the record to show. 279 F. 2d 323. The case is here on petition for a writ of certiorari which we granted along with No. 340—*International Typographical Union* v. *Labor Board*, *post*, p. —, because of the conflict between them. 364 U. S. 877, 878.

What we have this day decided in *Carpenters Local 60* v. *Labor Board*, *ante*, p. —, is dispositive of the provision in the Board's order requiring respondents to reimburse union members for dues and assessments.

We also believe the Court of Appeals was right in concluding that the contract on its face is not unlawful even though the foremen—who are union members—do the hiring. In the first place, the contract (unlike the General Laws) does not require journeymen and apprentices to be union members. In the second place, the provisions of the contract which we have set forth make the foremen "*solely* the employers' agents," as the Court of Appeals concluded.[2] 279 F. 2d, at 330. Finally, as we

[2] The 1947 amendments to the Act changed the ruling in *Packard Motor Car Co.* v. *Labor Board*, 330 U. S. 485 which held that foremen were "employees." Section 2 (3) now excludes from the term "employees" one who is "employed as a supervisor." Section 2 (11) defines a "supervisor" as one "having authority, in the interest of the employer, to hire," etc., employees. Section 14 (a) provides:

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

As stated by Senator Taft, under these provisions even a union

said in *Teamsters Local 357* v. *Labor Board*, decided this day, *ante*, p. —, we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, "In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." 279 F. 2d, at 330.

We also agree with the Court of Appeals that the General Laws provision of the contract is not *per se* unlawful. For it has in it the condition that only those General Laws of the union are incorporated which are "not in conflict with this contract or with federal or state law." Any rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract since it would be at war with the Act. We can say with Judge Prettyman in *Honolulu Star Bulletin* v. *Labor Board*, 274 F. 2d 567, 570, that while the words "not in conflict with federal . . . law" might in some circumstances be puzzling or uncertain as to meaning, "there could hardly be any uncertainty respecting a closed-shop clause." For the command of § 8 is clear and explicit and the only exception is plainly spelled out in the provisos to § 8 (a)(3).

Whether in practice respondents maintained and enforced closed-shop and preferential hiring conditions raises a distinct question.

The Board's case comes down to the method by which those in the mail room became journeymen. One could either take an apprentice training program or pass a

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of foremen could be recognized by an employer, though no employer could be compelled to do so. S. Rep. No. 105, 80th Cong., 1st Sess., p. 5.

competency examination. Apprentices were hired by the foremen; but the Court of Appeals found that there were no discriminatory practices in the actual hiring of apprentices. If a person followed the examination route, the contract provided for it to be given "by impartial examiners qualified to judge journeyman competence selected by the parties hereto." The examiners were union officials and the mail-room foremen.

The union proposed and News Syndicate agreed in 1956 to put into the class of a "regular substitute" those extras who in the prior two years had earned 15 vacation credits, which was another way of describing those who had averaged about three days' work a week. Those who were hired on a day-to-day basis ("shaped for work") included 60 nonunion men. Of these, 31 were invited to take the examination. They passed, were made "regular substitutes," and subsequently became union members. Thereafter each of the new "regular substitutes" was hired prior to Randall, though he had "shaped" at the News longer than many of them. Randall, it appears, had full-time outside jobs that kept him from "shaping" regularly.[3] Arrigale was a nonjourneyman

[3] Burton Randall is neither a union member, nor a journeyman within the meaning of the contract between the union and the News. The hiring practices at the News are as follows: The minimum mailing-room staff ("regular situation holders") are both union members and journeymen; they report for work each night and are not required to "shape." To fill in vacancies and to meet added needs, the foreman next turns to "regular substitutes," who are both journeymen and union members. Next in line of priority are those the Board insists are referred to as "outside card men," but who are at any rate both journeymen and union members regularly shaping up for other newspapers, but available for work on the News. The lowest priority category consists of what the Board calls "nonunion shapers" (and the union, "non-journeymen casuals"); at any rate, these men have neither union membership or journeymen status. Within the category, such men are ranked in seniority rank running

who shaped up for the Wall Street Journal, which had essentially the same hiring setup as the News. The asserted discrimination occurred when "outside card-men" were hired in preference to Arrigale, although Arrigale was "shaping" steadily and was the oldest nonunion extra. The foreman testified he took "outside card-men" because he could be sure of their competency, because they would have taken the journeyman test or served as apprentices. There was no evidence that membership in the union was a condition for the journeyman test, save that all journeymen in fact did become union men.

Respondents, therefore, contend that to accord priority in the hire of extras to men who work regularly for the employer (and who also have the journeyman status) is a hiring system based on competency and legitimate employee qualifications.

The Court of Appeals concluded:

> "We find . . . a dearth of evidence either that a Union journeyman has ever been hired in preference (let alone, an unlawful preference) to a nonunion journeyman, or that the qualifying standards for taking a competency examination are discriminatory. The record is barren of even the slightest hint that there has been discrimination in the conduct of the examinations. Availability, dependability and regularity of service, as well as mere competency, are valid nondiscriminatory considerations in determining the order of hire. The fact that one applicant is as competent as another, does not mean that the other may not properly be preferred

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from the date of first shaping up for the News. Burton Randall is a "nonunion shaper" or "non-journeyman casual." He has been turning up for the "shaping" at the News for a good many years; for most of them, he showed only on Fridays and Saturdays since he held another job. From 1950 to 1956, he was third in seniority on the "casual's list"; from 1956, he was first on that list.

on the basis of his other qualifications. And the fact that those achieving status as new 'regular substitutes' subsequently became Union members and even indicated their willingness to do so prior to the adoption of the standard, does not indicate, at least on this record, that the standard, seemingly fair, was discriminatory in its effect. Randall admitted that he would have welcomed the opportunity to become a Union member, and for aught that appears in the record, so would the remaining extras who did not meet the established standard.

"We conclude that the record does not warrant a finding that the hiring system in general, or the competency system in particular, by its discrimination against nonunion applicants, encouraged Union membership." 279 F. 2d, at pp. 333–334.

This finding of the Court of Appeals disposed of Arrigale's complaint and all of Randall's with the exception of the loss of one night's employment as to which the court sustained the Board. The Board drew contrary inferences. But it does not now seriously challenge the foregoing finding of the Court of Appeals. Rather, its main reliance is on the long history of ITU's use of the closed shop, the fact that foremen were union members, and the obscurity of the "not in conflict" clause of the agreement. We think the reversal of the Board on the facts by the Court of Appeals was within the scope of review entrusted to it. See *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 490–491.

Affirmed.

MR. JUSTICE WHITTAKER dissents. See his dissenting opinion in *Carpenters Local 60* v. *Labor Board*, decided this day, *post*, p. —.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 339.—October Term, 1960.

National Labor Relations Board, Petitioner, v. News Syndicate Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

I join the Court's opinion on the basis of the reasoning set forth in my concurring opinions in No. 68 and in Nos. 64 and 85.

Here, as with respect to the "hiring hall" clause in Nos. 64 and 85, I think the Board's finding that the "General Laws" clause "encouraged" union membership must be accepted. I need only add that in light of the historic use of such clauses to maintain closed-shop conditions, I would not be willing to overrule the Board's determination that those employed or seeking employment in this newspaper's mail room would regard the innocently worded incorporation of the union's valid "General Laws" as in fact evidencing the employer's and union's intent to allow forbidden union bylaws to govern their relationship as regards employment, until a finding of an unfair labor practice arising therefrom had actually been made.

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No. 339.—October Term, 1960.

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[April 17, 1961.]

Mr. Justice Clark, dissenting.

I agree with the Court's disposition of that part of the Board's order requiring respondents to reimburse union members for dues and assessments. However, for the reasons stated in my dissent in Nos. 64 and 85, I believe that the inclusion in the agreement of the "General Laws" and "Foreman" clauses violated § 8 (b)(1)(A) and (2) and § 8 (a)(1) and (3). I, therefore, dissent from those portions of the Court's opinion.